APPENDIX

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APPENDIX A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 08-3826

[Filed November 24, 2009]

MICHAEL STRATECHUK, Individually and on behalf of his minor children, Appellant	)
v.	)
BOARD OF EDUCATION, SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT; BRIAN F. O'LEARY, In his official capacity as board president, Board of Education, South Orange-Maplewood School District; PETER P. HOROSHAK, In his official capacity as superintendent, South Orange-Maplewood School District	)

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 2-04-cv-06189)
District Judge: Honorable William H. Walls

Argued September 14, 2009

Before: SLOVITER, FUENTES, and
SMITH, Circuit Judges.

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OPINION OF THE COURT

SLOVITER, *Circuit Judge*.

The issue before us is whether a School District, in order to maintain a policy of complete religious neutrality, may prohibit celebratory religious music at school-sponsored events. The District Court, in a careful analysis of the facts on record and the applicable law, upheld the School District's discretion to maintain and enforce its policy. *Stratechuk v. Bd. of Educ., S. Orange-Maplewood Sch. Dist.*, 577 F. Supp. 2d 731 (D.N.J. 2008).

The unsuccessful plaintiff, Michael Stratechuk, the father of two students in the School District of South Orange-Maplewood, New Jersey ("School District"), appeals the District Court's grant of summary judgment in favor of the School District (and related defendants) on Stratechuk's claims filed pursuant to 42 U.S.C. § 1983, that the School District's policy on the performance of religious holiday music violates the Establishment Clause and his children's First Amendment "right to receive information and ideas, right to learn, and right to academic freedom." *Id.* at 749.

I.

Factual and Procedural Background

Policy 2270, "Religion in the Schools" ("Policy 2270"), was adopted on April 2, 2001, by the South

Orange-Maplewood Board of Education. It provided that:

> It is the goal of the [School District] to foster mutual understanding and respect for the right of all individuals regarding their beliefs, values and customs. In pursuing this goal, we recognize that we serve a diverse community with varying cultural, ethnic and religious orientation.
>
> We are cognizant of the role of culture, including religion, in the development of our society and believe that objectively teaching about religion and its role in the social and historical development of civilization does not violate the religious neutrality of the public schools.
>
> Music, art, literature, dance and drama along with religious customs and traditions, which have come to us from various elements of our national population, may be used to broaden our pupils' awareness of the many elements that comprise our diverse American culture.
>
> In any reference to religion in the schools, the district is guided by the following concepts when determining the appropriateness of activities: (1) the activity should have a secular purpose, (2) the activity should neither advance nor inhibit religion, and (3) the activity should have relevance to the curriculum.

App. at 365.

On the issue of the "Treatment of Religion in the Curriculum," Policy 2270 permitted the "inclusion of religious literature, music, drama, dance and visual arts in the curriculum provided that it achieves specific goals of the written curriculum in the various fields of study; that it is presented objectively; and that it neither inhibits nor advances any religious point of view." App. at 365. It also permitted student-initiated expression of "religious belief or non-belief in compositions, works of art, music, speech and debate." App. at 365. Policy 2270 permitted the use of religious symbols only "to teach about historical or cultural context, not to promote or celebrate religious concepts, events or holidays." App. at 365.

As most relevant to this appeal, the section," Treatment of Religious Holidays in Classrooms, School Buildings, Programs or Concerts," provided:

> 1. Religious holidays are not to be celebrated in the schools, except in the form of the secular nature of that holiday. However, opportunities to learn about cultural and religious traditions should be provided within the framework of the curriculum. Information about religious and cultural holidays and traditions, focusing on how and when they are celebrated, their origins and histories may be part of this instruction.
> 2. In planning school activities related to the teaching about religious holidays or themes, special effort must be made to ensure the activity is not devotional and that pupils of all faiths and beliefs can join without feeling they are betraying their own faith or beliefs.
> 3. Decorations with religious significance are not permitted.

> 4. Religious music, like any other music, can only be used if it achieves specific goals of the music curriculum.
>
> a. Music programs prepared or presented by student groups as an outcome of the curriculum shall not have a religious orientation or focus on religious holidays.

App. at 366.

Prior to the 2004-2005 academic year, holiday music (Christmas and Hanukkah songs) were performed at the School District's December concerts. In the Fall of 2003, the mother of a School District student told her child's music teacher, William Cook, that she objected to her daughter playing the "Christmas Sing Along" at the December concert. App. at 77. Cook recounted this concern to Nicholas Santoro, the Director of Fine Arts, who passed the concerns on to James Memoli, the Assistant Superintendent.

In any event, the music repertoire of the December 2003 concert included "Star Spangled Banner," "Sounds of Hanukkah (a medley of 3 Hanukkah tunes)," "*Recuerdos de la Alhambra*," and the "Christmas Sing Along" which was a medley of "Joy to the World," "Silent Night," "Oh, Come All Ye Faithful," and "Hark the Herald Angels Sing."

After that concert, the objecting mother sent a letter to Peter Horoschak, the Superintendent of the School District, "express[ing her] concern that the School Board policy was not followed" because "point 4(a) [of Policy 2270] clearly states 'Music programs prepared or presented . . . shall not have a religious

orientation or focus on religious holidays.'" App. at 181. The letter continued, "[a]s you know, the selection of music, both instrumental and vocal, had a clear religious orientation and focused on religious holidays." App. at 181-82. Horoschak responded, "[i]t was our judgment that because of the variety of both secular and 'holiday' (i.e., Hanukkah and Christmas) selections . . . there was not one particular focus on a particular religion or religious group, and, as such, there was no attempt to advance any religious point of view." App. at 183. However, he also noted that "concerns raised by parents regarding the holiday concert at South Orange Middle School suggest that the policy needs further clarification,"[1] and that Memoli and Santoro "are engaged in on-going discussions about such musical programs, and they will recommend to me suggested language for regulations which should clarify what types of programs and activities are permissible and not permissible under this policy." App. at 183.

On March 24, 2004, the School Board addressed the December concert issue at Horoschak's annual performance review, and, according to Horoschak's deposition testimony, the "board members had heard from some community members about instrumental music that . . . people felt represented a celebration of Christmas holidays and also there ha[d] been

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[1] The District Court noted that Horoschak "had a general recollection of parents' [sic] expressing similar concerns [about] the December concerts during the time period between 1998 and 2003, although he could not remember any specific instance other than one where a Muslim parent raised concerns that his/her faith was not represented during the concert." *Stratechuk*, 577 F. Supp. 2d at 734-35 n.1.

discussion about the fact that you really can't balance all religious groups in these representations in these types of performances." App. at 166. The Board decided "that [Policy 2270] would be consistently implemented . . . [so] that there wouldn't be so much discretion . . . by every faculty member," and discussed drafting regulations to clarify the policy. *Stratechuk*, 577 F. Supp. 2d at 735.

After meeting with relevant faculty and staff, Santoro issued a memo to the Department of Fine Arts, dated October 29, 2004 ("October 2004 Memo"). It stated that the "board policy, as it is written, will be implemented," and included the following bullet points:

> [1.] All programs will be reviewed and approved by me.
>
> . . .
>
> [2.] We will avoid any selection which is considered to represent any religious holiday, be it Christmas, Hanukkah, etc. This holds true for any vocal or instrumental setting.
>
> [3.] I would strongly suggest you gear towards the seasonal selections – Winter Wonderland, Frosty The Snowman, etc. Music centered on Peace is also a nice touch.
>
> [4.] For the High School, the Brass Ensemble repertoire must also adhere to this policy, so the traditional carols must be eliminated from the repertoire.
>
> [5.] The MKL [sic] Gospel Choir cannot perform at the CHS Holiday Assembly for the student body.

> [6.] Your printed programs for any Holiday concert must avoid graphics which refer to the holidays, such as Christmas Trees and dreidels.

App. at 249.

In response to the October 2004 Memo, there were complaints from, inter alia, music teachers, parents, the South Orange Village President, and representatives of the MLK Gospel Choir. For example, seventeen members of the Maplewood community signed a "Petition Asking the Board of Education to Honor Religious Tolerance." App. at 250. Other complaints were more vigorous.

However, as Cook explained in his deposition testimony, Policy 2270 "didn't prohibit all religious music" in performances, only "music based on . . . or themes consistent with pieces commonly associated with the holiday at the time of the holiday." App. at 92. Accordingly, Santoro approved the performance of Vivaldi's *Gloria in Excelsio* (*Cum sancto spiritu*) because "[t]he program does not have a religious orientation and it does not refer to a holiday. . . ." App. at 370.

In addition, Policy 2270 and the October 2004 Memo were interpreted to prohibit only the performance of celebratory holiday music – not the teaching of such music in particular or of religious music in general. For example, Santoro testified that "[i]n performance [of the winter] concerts those selections [i.e., Joy to the World, Oh, Come All Ye Faithful, Hark, the Herald Angels Sing, and Silent Night] would not be allowed," although "[i]n the

curriculum they would be allowed to be taught." App. at 133. He amplified that point in a letter to music teacher Barbara Eames stating that she could continue to "teach about the different holidays in . . . music classes" because "[c]lassroom work is not a 'program,'" within the meaning of Policy 2270. App. at 369. Although Eames contended in a declaration to the District Court that the October 2004 Memo "has caused me to exclude certain music pieces that I would have used to achieve specific goals of the music curriculum" and "has caused me to censor my music curriculum . . . in a way that I believe is harmful to [my students'] education and contrary to the goals of the music curriculum," App. at 391, she conceded in her deposition testimony that "I haven't removed [Christmas or Chanukah songs] from my classroom curriculum because the policy does not do that," App. at 310.

The music performed at the 2004 December concert (approved by Santoro) included "Jingle Bell Rock," Vivaldi's "Gloria," "Winter Wonderland," "*Hava Nagila*," "Madrigal of the Bells," "Rudolph the Red-Nosed Reindeer," and "Frosty the Snowman." Since 2004, songs with religious content have been performed at the December concerts; the 2005 concerts included "*Concerto VIII Fatto per la notte di natale*," "Waters of Babylon (psalm 137)," "*Jubilate*," and "*Agnus Dei / Cum Sanctis*."

On December 17, 2004, Stratechuk filed this action pursuant to 42 U.S.C. § 1983 in the United States District Court for the District of New Jersey (and later an amended complaint) naming as defendants the School District, its Board of Education, the Board President and Superintendent Peter P. Horoschak

(together, "School District").[2] The Complaint alleged that during "the 2004/2005 school year . . . Defendants created, adopted, and implemented a strict policy of banning all religious music, including instrumentals, from the public schools in the district," such that "students . . . are no longer permitted to learn about, listen to, and participate in the presentation of traditional Christmas music during such curricular and co-curricular events as year-end holiday concerts, assemblies, and recitals." Complaint at ¶ 15. Stratechuk alleged that the School District's actions violated his and his minor children's rights under the Establishment Clause of the First Amendment by "convey[ing] the impermissible, government-sponsored message of disapproval of and hostility toward religion, including Christianity. . . ." Complaint at ¶ 21. In addition, Stratechuk claimed that the same actions deprived him "and his minor children of their right to receive information and ideas, their right to learn, and their right to academic freedom, which are guaranteed under the First Amendment. . . ." Amended Complaint at ¶ 24. Stratechuk sought (1) a declaratory judgment that his and his children's constitutional rights had been violated, (2) "a permanent injunction enjoining Defendants' policy, practice, and/or custom of banning religious music within the School District," (3) "damages for the past loss of his and his minor children's constitutional rights," and (4) attorneys' fees, costs and expenses. Amended Complaint at 7.

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[2] In addition to stating that Stratechuk was the father of two minor children enrolled in the School District, the Complaint also noted that he was a music teacher at Hunter College in Manhattan, a professional violinist and conductor, and a Christian. Complaint ¶¶ 8-9.

On October 10, 2005, *after* the period at issue in Stratechuk's complaint, the School District amended Policy 2270 by removing Section 4(a). *See* p. 4-5 *supra*. At the same time, in order to clarify Policy 2270 the School District adopted regulation R-2270, "Religion in the Schools," App. at 385, which provides that for children in grades 6-12, the "performance of music with religious text is appropriate when doing so is an outgrowth of the curriculum," but "musical performances shall not be celebrations of particular religious, ethnic or cultural holidays," App. at 386. For elementary school students, the performance of "music with a religious text shall be avoided." App. at 386. In addition, the section entitled "Celebration of Religious Holidays Prohibited" states that "[m]usical concerts or assemblies which take place during holiday seasons will not be 'holiday concerts,' which celebrate religious, cultural or ethnic holidays." App. at 387. Stratechuk has not amended his complaint to include a challenge to this regulation or any of the School District's specific actions that occurred after he filed his amended complaint. The District Court, Appellees, and Amici correctly note that the schools have permitted the performance of music with religious content since 2004. *See Stratechuk*, 577 F. Supp. 2d at 738; Appellee's Br. at 11-12; Amici's Br. at 10-11.

The District Court dismissed Stratechuk's complaint, finding that his claim relied on Policy 2270 alone and that he could not state a claim under that policy. *See Stratechuk v. Bd. of Educ. of S. Orange-Maplewood Sch. Dist.*, 200 F. App'x 91, 93-94 (3d Cir. 2006). This court vacated and remanded in a non-precedential opinion, noting that the "policy that Stratechuk alleges was in place in 2004-2005 is decidedly different than the 'official policy'" articulated

in the text of Policy 2270 and concluding that "a categorical ban on exclusively religious music," of the type that Stratechuk alleges, "appears to state a claim under the First Amendment." *Id.* at 94.

On remand, the parties engaged in discovery and both moved for summary judgment. The District Court granted summary judgment in favor of the School District, holding that Policy 2270, as interpreted by the October 2004 Memo (and as applied) did not violate the Establishment Clause or any First Amendment "right to receive information, ideas, right to learn, and right to academic freedom." *Stratechuk*, 577 F. Supp. 2d at 749. Stratechuk timely appealed.

II.

Jurisdiction and Standard of Review

The District Court had jurisdiction over Stratechuk's § 1983 claim under 28 U.S.C. §§ 1331 and 1343(a)(3), and this court has jurisdiction under 28 U.S.C. § 1291.

This court "review[s] a grant or denial of summary judgment de novo, applying the same standard as the District Court." *Pichler v. UNITE*, 542 F.3d 380, 385 (3d Cir. 2008). Summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "In making this determination, we 'must view the facts in the light most favorable to the nonmoving party and draw all inferences in that

party's favor.'" *Norfolk S. Ry. v. Basell USA, Inc.*, 512 F.3d 86, 91 (3d Cir. 2008) (quoting *Abramson v. William Paterson Coll. of N.J.*, 260 F.3d 265, 276 (3d Cir. 2001)).

III.

Discussion

A. The Establishment Clause

Stratechuk launched a broad First Amendment attack against the School District's interpretation of Policy 2270, focusing in the first instance on the Establishment Clause. Under the Establishment Clause of the First Amendment,[3] "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I. The Supreme Court has read this clause to forbid not only "law respecting an establishment of a religion," U.S. CONST. amend. I, but also "an official purpose to disapprove of a particular religion or of religion in general," *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993). "The touchstone for our [Establishment Clause] analysis is the principle that the 'First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.'" *McCreary County v. ACLU*, 545 U.S. 844, 860 (2005) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)).

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[3] The Establishment Clause of the First Amendment, "of course, has long been held applicable to the States." *Wallace v. Jaffree*, 472 U.S. 38, 42 n.10 (1985).

Under the so-called *Lemon* test, a state law or governmental action violates the Establishment Clause if (1) it lacks a secular purpose, (2) "its principal or primary effect . . . advances []or inhibits religion," or (3) it "foster[s] an excessive government entanglement with religion." *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (citation and quotation omitted). Although still good law, *see McCreary County*, 545 U.S. at 859-61, some Justices have criticized the *Lemon* test, *see, e.g., Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring) ("Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys . . . ."). Without discarding the *Lemon* test, the Court has set forth two related tests, the "coercion test," *see Lee v. Weisman*, 505 U.S. 577 (1992), and the "endorsement test," *see Lynch v. Donnelly*, 465 U.S. 668, 687-94 (1984) (O'Connor, J., concurring). The District Court analyzed Stratechuk's claim under *Lemon*, concluding that the *Lemon* test was the most appropriate for the claim before it. Stratechuk argues that the School District's policy and conduct violates the Establishment Clause under both the *Lemon* test and the endorsement test.

1. The *Lemon* Test

"In applying the purpose [prong of the *Lemon*] test, it is appropriate to ask whether government's actual purpose is to endorse or disapprove of religion." *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) (internal quotation omitted). "While [a court] is normally deferential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham." *Edwards v. Aguillard*, 482 U.S. 578, 586-87 (1987). As such, "[t]he eyes that look to purpose belong to an objective observer, one who takes account of the traditional external signs that show up in the text, legislative history, and implementation of the statute, or comparable official act." *McCreary County*, 545 U.S. at 862 (internal quotations omitted).

Here, there is no religious purpose – only a secular one – so the issue is whether this secular purpose is actually, as Stratechuk maintains, a purpose to disapprove of religion. The School District argues, and the District Court found, that the purpose of the policy was to avoid government endorsement of religious holidays and a potential Establishment Clause violation. Although there are few opinions addressing this type of secular purpose, the District Court cited several courts of appeals' opinions where the courts held that "[a]ctions taken to avoid potential Establishment Clause violations have a secular purpose under the purpose prong of the *Lemon* test." *Stratechuk*, 577 F. Supp. 2d at 743 (citing *Vasquez v. Los Angeles County*, 487 F.3d 1246, 1255 (9th Cir. 2007) (holding that county's removal of the image of the cross from its official seal in order "to avoid a potential Establishment Clause violation [had a] valid

secular purpose under *Lemon*"); *Roberts v. Madigan*, 921 F.2d 1047, 1054 (10th Cir. 1990) (holding that school district's order directing teacher not to leave his bible in sight or read silently from it during classroom hours had a secular purpose in that it was intended "to assure that none of [the teacher's] classroom materials or conduct violated the Establishment Clause"); *cf. Borden v. Sch. Dist. of Twp. of E. Brunswick*, 523 F.3d 153, 174 (3d Cir. 2008) ("The Supreme Court has stated that 'compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech.'" (quoting *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 761-62 (1995)))). Indeed, our own court has said as much. *Busch v. Marple Newtown Sch. Dist.*, 567 F.3d 89, 100 (3d Cir. 2009).

Stratechuk maintains that this alleged purpose is a "sham" because the Establishment Clause does not require a prohibition on performing religious music and "[v]irtually every court that has been asked to review year-end holiday concerts or music programs that have included religious music or music associated with religious holidays has upheld them." Appellant's Reply Br. at 19-20. In support of this assertion, Stratechuk cites cases from the Eighth, Tenth, and Fifth Circuits that upheld the constitutionality of performing religious music in public schools. Appellant's Reply Br. at 20 (citing *Bauchman ex rel. Bauchman v. W. High Sch.*, 132 F.3d 542, 562 (10th Cir. 1997) (upholding Utah school policy permitting music teacher to select explicitly Christian music and Christian religious sites for performance of school choir); *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 407-08 (5th Cir. 1995) (upholding Texas high school's practices, such as permitting choir to use

Christian religious song as its theme song); *Florey v. Sioux Falls Sch. Dist. 49-5*, 619 F.2d 1311, 1319 (8th Cir. 1980) (upholding South Dakota school policy that permitted music "having religious themes or basis," including Christmas carols, as "part of the curriculum for school-sponsored activities and programs if presented in a prudent and objective manner . . . .")).

The cases cited by Stratechuk all upheld the policy of the respective schools or school districts. That is far different from holding that the First Amendment compels a school district to permit religious holiday music or risk running afoul of the First Amendment. Stratechuk has offered no persuasive authority that the First Amendment prevents South Orange-Maplewood School District from formulating a policy that precludes performance of religious holiday music.

Moreover, as the District Court noted, the assumption "that the Establishment Clause does not require the restrictions enacted by Defendants . . . does not automatically render Defendants' stated purpose a 'sham.'" *Stratechuk*, 577 F. Supp. 2d at 744. In other words, even if performance of religious songs did not violate the Establishment Clause, it does not follow that the goals underlying the School District's desire to avoid a potential Establishment Clause violation were disingenuous or impermissible.

A similar issue was raised in *Bishop v. Aronov*, 926 F.2d 1066, 1077 (11th Cir. 1991). In that case, a University had placed certain limits on a professor's in-class comments regarding religion. The court upheld those limits under the *Lemon* test even assuming that the comments did not violate the

Establishment Clause. The court explained that "the restrictions neither advance nor inhibit religion – to the contrary, the University . . . simply attempted to maintain a neutral, secular classroom . . . ." *Id.*

As the District Court noted, the October 2004 Memo "was spurred by at least one parent's complaint," as well as the practical impossibility of including every religion in a December holiday concert. *Stratechuk*, 577 F. Supp. 2d at 744. In fact, the concerns that led to the October 2004 Memo were the very type of concerns underlying the Establishment Clause jurisprudence in this area, i.e., the need for government neutrality towards religious institutions and beliefs, *McCreary County*, 545 U.S. at 860, and the impressionability of young children, *Edwards*, 482 U.S. at 583-84. In addition, as Amici note, "the Constitution does not require the School to promote religion to the constitutionally permitted maximum and its failure to do so does not make it anti-religious in any constitutionally significant way. School districts can determine how close to the 'Establishment Clause line' they wish to place themselves . . . ." Amici Br. at 33.

Moreover, as the School District points out, Stratechuk's argument that the purpose of the "current interpretation of Policy 2270 is to unconstitutionally disapprove of religion and, in particular, Christianity . . . is based largely upon plaintiff's inaccurate factual contention that defendants' policy amounts to a ban on religious music in the school system." Appellee's Br. at 37. To the contrary, it is clear that the policy, as interpreted, does not prevent – and the record shows that it has not in fact prevented – the teaching of religious holiday songs

in the classroom or the performance of songs with religious content at the December concerts (albeit not songs specifically related to winter holidays).

It follows that the District Court did not err in holding that the School District's actions did not have an impermissible purpose within the meaning of *Lemon*.

Turning to the *Lemon* test's effect prong, which considers whether the "principal or primary effect" of the challenged policy or practice "advances []or inhibits religion," *Lemon*, 403 U.S. at 613, we note Justice O'Connor's explanation that "[t]he effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval," *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring). "While an adjudication of [a policy's] effect must take into account the perspective of one who is neither Christian nor Jewish, as well as of those who adhere to either of these religions, the constitutionality of its effect must also be judged according to the standard of a 'reasonable observer.'" *County of Allegheny v. ACLU*, 492 U.S. 573, 620 (1989) (opinion of Blackmun, J.). In a passage describing the endorsement test that is often quoted to describe the effects prong of the *Lemon* test, Justice O'Connor also noted that "the 'history and ubiquity' of a practice is relevant because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion." *Id.* at 630 (O'Connor, J., concurring).

Stratechuk argues that the "'effect' of the School District's ban on the performance of religious music,

irrespective of any alleged 'purpose,' conveys a message of disapproval of religion . . . ." Appellant's Br. at 44. For example, Stratechuk maintains that "[t]he reasonable observer would know that the MLK Gospel Choir was permitted in the past to perform traditional Christmas religious music at the Columbia High School Holiday Assembly but has now been banned from performing at this event pursuant to the School District's new policy. . . . In the final analysis, an informed, reasonable observer would conclude that [the policy] has the effect of disfavoring religion. . . ." Appellant's Br. at 46-47.

The District Court rejected this argument, concluding that "there is ample evidence available to the objective observer regarding the interpretation of Policy 2270 in the totality of the circumstances, which removes any claim that it conveys a message of disapproval of religion." *Stratechuk*, 577 F. Supp. 2d at 746. To this effect, the Court noted that the policy permits the inclusion of "religious material when appropriate, provided that it is presented objectively and that it fits within the curriculum." *Id.* The Court also noted that the policy requires "[a]ccomodat[ion of] student-initiated expression[s] . . . which reflect their beliefs or non-beliefs about religious themes. . . ." *Id.* (internal quotation omitted). "Moreover, Policy 2270 allows for the use of religious music, provided it achieves specific goals of the music curriculum." *Id.* (internal quotation omitted).

Moreover, the District Court also noted that "[a]lthough the interpretation of Policy 2270 restricts the performance of holiday music during the December concerts, music teachers have indicated that they continue to teach those songs in the classroom . . . and

Director of Fine Arts Santoro has confirmed the appropriateness of this practice." *Id.* at 747.

Similarly, the District Court emphasized that songs with religious content have continued to be played at the December concerts since promulgation of the October 2004 Memo, as the policy "simply restricts the performance of holiday music at the time of the religious holiday that the music honors." *Id.* On this basis, the District Court had ample reason to conclude as follows: "Given the continued performance of religious songs and the continued teaching of holiday music in the classroom, the objective observer would not determine that the implementation of Policy 2270 . . . sends a message of disapproval of religion." *Id.*

We note with approval the District Court's observation that the restriction on "the performance of holiday music, which changed earlier practices within the School District . . . . [did not] automatically convey a message of disapproval of religion because as the Supreme Court observed in *County of Allegheny*, '[a] secular state, it must be remembered, is not the same as an atheistic or antireligious state.'" *Id.* at 747-48 (quoting 492 U.S. at 610). This point is elaborated in the Amici's brief which states that "Establishment Clause jurisprudence recognizes that neutrality towards religion is quite distinct from hostility towards it." Amici Br. at 17. The brief cites an Eleventh Circuit opinion that states that "[a] contrary conclusion would 'totally eviscerate the establishment clause.'" Amici Br. at 17 (quoting *Smith v. Bd. of Comm'rs*, 827 F.2d 684, 693 n.9 (11th Cir. 1987)). *Smith* also quoted a Ninth Circuit case, *Grove v. Mead Sch. Dist. No. 354*, 753 F.2d 1528, 1536 (9th Cir. 1983) (Canby, J., concurring), which stated that "distinctions

must be drawn to recognize not simply 'religious' and 'anti-religious,' but 'non-religious' governmental activity as well.'" As the Amici note:

> Were that not the case, almost every government action vis-a-vis religion would fall into one of two columns – pro- or anti-religion, promoting or hostile to – and be subject to Establishment Clause attack in either event. That is the logic of Plaintiff's legal theory; indeed, that theory would, ironically, subject actions that sought to allow more religious content to that same black or white analysis.

Amici's Br. at 18. Numerous courts have rejected the suggestion that "secular" means "anti-religious." *See, e.g.*, *County of Allegheny*, 492 U.S. at 610-11; *Smith*, 827 F.2d at 693-94; *Grove*, 753 F.2d at 1536 (Canby, J., concurring).

We reject Stratechuk's argument that the fact that numerous students and parents have petitioned the school board and strongly urged it to reverse its policy "demonstrat[es] beyond genuine dispute that a reasonable observer could only perceive that the policy disfavors religion." Appellant's Br. at 26. The constitutionality of a school board's policy toward religion cannot be decided by reference to popular opinion. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 316-17 (2000) (rejecting argument that school prayer policy was constitutional because it was approved by vote of the student body).

The fin. l prong of the *Lemon* test considers whether the challenged policy or practice "foster[s] an excessive government entanglement with religion."

Lemon, 403 U.S. at 612-13 (internal citation omitted). As now-Justice Alito wrote when he was a member of this court, an excessive entanglement "requires more than mere '[i]nteraction between church and state,' for some level of interaction has always been 'tolerated.'" *Child Evangelism Fellowship of N.J. Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 534 (3d Cir. 2004) (quoting *Agostini v. Felton*, 521 U.S. 203, 233 (1997)). In *Agostini*, the Supreme Court explained that the "factors employed 'to assess whether an entanglement is "excessive" are similar to the factors . . . use[d] to examine "effect."'. . . Thus, we must look to 'the character and purposes of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority.'" *Id.* at 534-35 (quoting *Agostini*, 521 U.S. at 232).

Stratechuk argues that the School District's policy causes excessive entanglement because "school officials will be required to screen music to determine whether it is religious or secular in nature [and] [d]rawing such distinctions between secular and religious themes will necessarily cause an entanglement with religion." Appellant's Br. at 48. The District Court acknowledged that the interpretation of the policy "involves some entanglement with religion" because the teachers must make selections with religious concerns in mind and because Santoro must approve these selections. *Stratechuk*, 577 F. Supp. 2d at 748. However, the Court concluded that "[t]his type of oversight - this drawing of distinctions between secular and religious themes - strikes the Court as no different from the screening that school districts engage in every day to ensure neutrality in matters of religion." *Id.* at 749. The District Court also observed

that "[t]o conclude otherwise ignores the evidence and would undermine governmental efforts to comply with the Establishment Clause." *Id.* We agree, and conclude that when examined under the *Lemon* test, Policy 2270 does not contravene the Establishment Clause.

B. The Endorsement Test

In light of the critique of the *Lemon* test, we also consider Stratechuk's claim that Policy 2270 fails the "endorsement test," a modification of the *Lemon* test. This test "dispenses with *Lemon*'s 'entanglement' prong and, combining an objective version of *Lemon*'s 'purpose' prong with its 'effect' prong, asks whether a reasonable observer familiar with the history and context of [a religious] display would perceive [it] as a government endorsement of religion." *Modrovich v. Allegheny County*, 385 F.3d 397, 401 (3d Cir. 2004) (citing *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring)). In addition, "[t]he endorsement test asks whether the government action has 'the effect of communicating a message of government endorsement or disapproval of religion.'" *Id.* (quoting *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring)).

The District Court held that this test did not apply because "this matter does not involve a religious display on government property or state participation in a religious activity." *Stratechuk*, 577 F. Supp. 2d at 742 n. 8. There is merit to Stratechuk's argument that this court has not limited the endorsement test to cases involving religious displays on government property. *See, e.g.*, *ACLU v. Black Horse Pike Reg'l Sch. Bd.*, 84 F.3d 1471, 1486-87 (3d Cir. 1996) (en

banc) (applying endorsement test to challenge to student-led prayer at high school graduation).

As this court stated in that case, "[t]his endorsement test has at times been characterized as part and parcel of the *Lemon* test, and at other times as separate and apart from it. Whether 'the endorsement test' is part of the inquiry under *Lemon* or a separate inquiry apart from it, the import of the test is the same. We must determine whether, under the totality of the circumstances, the challenged practice conveys a message favoring or disfavoring religion." *Id.* at 1485-86. The result is the same under the endorsement test as under the effects prong of the *Lemon* test and our earlier conclusion that the School District's policy does not exhibit endorsement or hostility towards religion is equally applicable here.

C. Additional First Amendment Claim

Stratechuk does not limit his First Amendment challenge to the Establishment Clause but also argues that the School District has violated his children's (and his) First Amendment rights by "seek[ing] to 'contract the spectrum of available knowledge' for its students by banning certain religious music from curricular and co-curricular activities and events simply because it is religious or associated with a religious holiday." Appellant's Br. at 51. We see no merit in this argument.

Stratechuk asserts that, through Policy 2270 as interpreted, "the government is seeking to remove an entire category of 'ideas' from the curriculum." Appellant's Br. at 50 n.9. Presumably, Stratechuk equates "ideas" with religious celebratory music.

Assuming without deciding the validity of this equation, Stratechuk's assertion is incorrect. There is no restriction of the students' access to the "ideas" to which he refers because the students have access to religious celebratory music in the classroom within the framework of the curriculum.

The District Court construed Stratechuk's argument as contending that Policy 2270 as interpreted violates his children's right to receive information and ideas. This led the District Court to an analysis of the Supreme Court's decisions in *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853 (1982), and *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). The District Court noted that *Pico* dealt with the right to receive ideas (the school board's decision to remove certain books from the school district's libraries) whereas *Kuhlmeier* dealt with the right to express ideas (censoring the student newspaper). The District Court stated that although *Pico* seemed on the surface more applicable to Policy 2270, it concluded that applying *Kuhlmeier* was more appropriate because the Supreme Court in that case addressed the issue as "whether the First Amendment requires a school affirmatively to promote particular student speech." 484 U.S. at 270-71. Because the *Kuhlmeier* Court held that the forum at issue in that case, the high school newspaper, was not a public forum, the school authorities had the discretion to "exercis[e] editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Id.* at 273:

Using *Kuhlmeier* as precedent, the District Court in this case concluded that the December concerts are not public fora, and that the School District's interpretation of Policy 2270 is reasonably related to legitimate pedagogical concerns. On that basis the District Court granted the defendants' motion for summary judgment with respect to Stratechuk's First Amendment claim. We see no error of law or abuse of discretion in the District Court's analysis.

IV.

Conclusion

We do not doubt Stratechuk's sincerity and commitment to the position he vigorously asserts in this litigation. But the overriding consideration for this court is that the School District administers public schools, and there are constitutional principles that govern the actions of public schools that do not limit private schools. Certainly, those of us who were educated in the public schools remember holiday celebrations replete with Christmas carols, and possibly even Chanukah songs, to which no objection had been raised. Since then, the governing principles have been examined and defined with more particularity. Many decisions about how to best create an inclusive environment in public schools, such as those at issue here, are left to the sound discretion of the school authorities. We see no constitutional violation in Policy 2270 or its application in this case.

We will therefore affirm the decision of the District Court.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 08-3826

[Filed November 24, 2009]

MICHAEL STRATECHUK, Individually and on behalf of his minor children, Appellant	)
v.	)
BOARD OF EDUCATION, SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT; BRIAN F. O'LEARY, In his official capacity as board president, Board of Education, South Orange-Maplewood School District; PETER P. HOROSHAK, In his official capacity as superintendent, South Orange-Maplewood School District	)

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 2-04-cv-06189)
District Judge: Honorable William H. Walls

Before: SLOVITER, FUENTES, and
SMITH, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued on September 14, 2009.

On consideration whereof, it is now hereby ADJUDGED and ORDERED that the judgment of the District Court entered August 28, 2008, be and the same is hereby affirmed. Costs taxed against appellant. All of the above in accordance with the opinion of this Court.

Attest:

/s/Marcia M. Waldron
Clerk

Dated: November 24, 2009

APPENDIX B

FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civ. No. 04-6189 (WHW)

[Filed August 29, 2008]

MICHAEL STRATECHUK, individually and on behalf of his minor children,	)
Plaintiff,	)
v.	)
BOARD OF EDUCATION, SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT; BRIAN F. O'LEARY, in his official capacity as Board President, Board of Education, South Orange-Maplewood School District; PETER P. HOROSHAK, in his official capacity as Superintendent, South Orange-Maplewood School District,	)
Defendants.	)

OPINION

Walls, Senior District Judge

Pursuant to Fed. R. Civ. P. 56, Plaintiff Michael Stratechuk moves for summary judgment on his first claim, alleging that "Defendants have conveyed the impermissible, government-sponsored message of disapproval of and hostility toward religion, including Christianity, in violation of the Establishment Clause." Defendants Board of Education, South Orange Maplewood School District (the "School Board"), Brian F. O'Leary, and Peter P. Horoschak ("Superintendent Horoschak") also move for summary judgment pursuant to Fed. R. Civ. P. 56, to dismiss Plaintiff's Amended Complaint in its entirety. The Court held oral argument on the motions for summary judgment on July 31, 2008. Defendants' motion for summary judgment is granted; Plaintiff's motion for summary judgment is denied.

FACTS AND PROCEDURAL BACKGROUND

Plaintiff Michael Stratechuk is the father and legal guardian of two minor children who live in the School District of South Orange and Maplewood, New Jersey (the "School District"). (Pl.'s Statement of Material Facts (No. 36-2) ("Pl.'s S.F.") ¶ 1.) During the 2004-2005 school year – the relevant time period – one of Plaintiff's children attended Columbia High School and the other attended Maplewood Middle School. (*Id.* ¶ 2.)

On April 2, 2001, the School Board adopted Policy 2270, Religion in the Schools. According to Policy 2270:

> It is the goal of the [School District] to foster mutual understanding and respect for the right of all individuals regarding their beliefs, values and customs. In pursuing this goal, we recognize that we serve a diverse community with varying cultural, ethnic and religious orientation.
>
> We are cognizant of the role of culture, including religion, in the development of our society and believe that objectively teaching about religion and its role in the social and historical development of civilization does not violate the religious neutrality of the public schools.
>
> Music, art, literature, dance and drama along with religious customs and traditions, which have come to us from various elements of our national population, may be used to broaden our pupils' awareness of the many elements that comprise our diverse American culture.

(Cert. of Michael F. O'Neill ("O'Neill Cert."), Ex. A (No. 37-4) at SO0140.) Given this goal the School Board adopted the following practices regarding the "Treatment of Religion in the Curriculum:"

> 1. Permit the inclusion of religious literature, music, drama, dance and visual arts in the curriculum provided that it achieves specific goals of the written curriculum in the various fields of study; that it is presented objectively; and that it neither inhibits nor advances any religious point of view.

2. Accommodate student-initiated expression in response to questions or assignments which reflect their beliefs or non-beliefs about religious themes.

    a. Students are free to express religious belief or non-belief in compositions, works of art, music, speech and debate. Provisions should be made so that such expression is neither encouraged nor discouraged, but is handled in a courteous and respectful manner.

3. Only permit religious symbols to teach about historical or cultural context, not to promote or celebrate religious concepts, events or holidays.

    a. Classroom use and/or display of religious symbols is permitted on a temporary basis as a teaching resource or aide only within the framework of the curriculum. The use and/or display of religious symbols should provide an environment whereby students of all faiths, beliefs or non-beliefs can participate without betraying their own faith or beliefs.

(Id., Ex. A at SO0140-41.) Moreover, the School Board adopted the following practices regarding the "Treatment of Religious Holidays in Classrooms, School Buildings, Programs or Concerts:"

1. Religious holidays are not to be celebrated in the schools, except in the form of the secular nature of that holiday. However,

opportunities to learn about cultural and religious traditions should be provided within the framework of the curriculum. Information about religious and cultural holidays and traditions, focusing on how and when they are celebrated, their origins and histories may be part of this instruction.

2. In planning school activities related to the teaching about religious holidays or themes, special effort must be made to ensure the activity is not devotional and that pupils of all faiths and beliefs can join without feeling they are betraying their own faith or beliefs.

3. Decorations with religious significance are not permitted.

4. Religious music, like any other music, can only be used if it achieves specific goals of the music curriculum.

    a. Music programs prepared or presented by student groups as an outcome of the curriculum shall not have a religious orientation or focus on religious holidays

(Id., Ex. A at SO0141.)

Before the 2004-2005 school year, holiday music, including traditional Christmas carols and Hanukkah songs, was performed at the School District's December concerts. (Pl.'s S.F. ¶¶ 3-4; Defs.' Br. in Support of Summ. J. (No. 37-2) ("Defs.' Supporting Br.") at 5.) In the Fall of 2003, music teacher William Cook contacted Sharon Cohen, a parent of one of his

students, "who objected to her daughter playing certain music that we were doing at a concert" and who stated that "she didn't want her daughter to play the music at the concert." (Pl.'s Mot. for Summ. J., Ex. C (No. 36-6) at 35:19-36:10, 40:10-18.) Ms. Cohen also told Mr. Cook that "Christianity was forced upon her in her youth." (Id., Ex. C, Ex. 4.) Mr. Cook advised the Director of Fine Arts, Nicholas Santoro ("Director of Fine Arts Santoro"), of his conversation with Ms. Cohen, and Director of Fine Arts Santoro recounted the situation to Assistant Superintendent James Memoli ("Assistant Superintendent Memoli"). (Id.)

On January 21, 2004, Ms. Cohen sent Superintendent Horoschak a letter, complaining that "the selection of music [at the South Orange Middle School 2003 December concert], both instrumental and vocal, had a clear religious orientation and focused on religious holidays. . . . in direct violation of the Board policy # 2270 4 (a)."[1] (Decl. of Attorney Robert J. Muise (No. 38), Ex. P-5 at SO0212-13.) On March 1, 2004, Superintendent Horoschak responded to Ms. Cohen's letter, noting that with respect to the 2003 December concert, "[i]t was our judgment that because of the variety of both secular and 'holiday' (i.e.,

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[1] According to Superintendent Horoschak, he had a general recollection of parents' expressing similar concerns regarding the subject matter of the December concerts during the time period between 1998 and 2003, although he could not remember any specific instance other than one where a Muslim parent raised concerns that his/her faith was not represented during the concert. (O'Neill Cert., Ex. B (No. 37-5) at 53:13-57:1.) Additionally, Assistant Superintendent Memoli stated that he "know[s] there have been other complaints over the years," but he "can't name the individuals." (Id., Ex. E (No. 37-8) at 23:24-25:3.)

Hanukkah and Christmas) selections . . . there was not one particular focus on a particular religion or religious group, and, as such, there was no attempt to advance any religious point of view." (Pl.'s Mot. for Summ. J., Ex. F (No. 36-10), Ex. P-6 at SO0375.) Superintendent Horoschak continued, however, that although "[w]e are cognizant of the policy, and are careful to follow it. . . . concerns raised by parents regarding the holiday concert at South Orange Middle School suggest that the policy needs further clarification." (Id.) Further, he stated that "Assistant Superintendent Jim Memoli and Director of Fine Arts Nicholas Santoro are engaged in on-going discussions about such musical programs, and they will recommend to me suggested language for regulations which should clarify what types of programs and activities are permissible and not permissible under this policy." (Id.)

On or about March 24, 2004, Superintendent Horoschak had his annual performance review with the School Board.[2] (Defs.' Supporting Br. at 5.) At this

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[2] At least one of the School Board members who was at the performance review was Shelly Slafkes. (Pl.'s S.F. ¶ 9.) She is a "good acquaintance" of Ms. Cohen. (Id. at n.6.) During the November 22, 2004 meeting of the School Board, she stated that "[i]t is my strongly held belief that school assemblies and other school activities should not contain religious content in our music." (Pl.'s Mot. for Summ. J., Ex. H (No. 36-13) at 28:8-10.) Ms. Slafkes suggested that "[w]hen religious content is included, many children – and I could speak for how I felt as a youngster – feel both uncomfortable and forced to choose between the chorus or band and their religious beliefs," and expressed her opinion that "the only way that the school district can respect the differences and beliefs of each person in our diverse communities is by eliminating religious celebration in our public schools." (Id.,

review, the issue of the implementation of Policy 2270 with respect to the December concerts was raised. (O'Neill Cert., Ex. B (No. 37-5) at 111:9-113:13.) According to Superintendent Horoschak, "board members had heard from some community members about instrumental music that they felt, people felt represented a celebration of Christmas holidays and also there ha[d] been discussion about the fact that you really can't balance all religious groups in these representations in these types of performances." (Id., Ex. B at 113:2-11.) Ultimately, the School Board indicated that the outcome that it desired was "that [Policy 2270] would be consistently implemented, that it be supervised, that there wouldn't be so much discretion at every – by every faculty member," (id., Ex. B at 114:2-10), and discussed with him drafting regulations regarding Policy 2270, (Defs.' Resp. to Pl.'s Statement of Material Facts (No. 43-2) ¶ 8; see Pl.'s S.F. ¶ 8.)

In September 2004, Director of Fine Arts Santoro held a department meeting, wherein he "discussed [with the School District music staff] how I would be approving their programs and that we could do religious music," but they should "try to avoid the holiday music." (O'Neill Cert., Ex. H (No. 37-11) at 57:13-24.) At that time, Director of Fine Arts Santoro had not yet told the School District music staff that "Christmas Carols [were] out". (Id., Ex. H at 58:3-5.) On October 14, 2004, Superintendent Horoschak met

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Ex. H at 28:10-18.) Ms. Slafkes noted, however, that "I do believe strongly that as part of the social studies, language arts, and other curriculum areas, we should and for the most part do teach our children about each religion and culture, their beliefs and holidays." (Id., Ex. H at 30:9-13.)

with Director of Fine Arts Santoro, Assistant Superintendent Memoli, and the School District's attorney, Ellen Bass (the "October 14, 2004 meeting"), "to review the requirements of Policy 2270 . . . and to resolve various parent concerns regarding the implementation of the policy." (Id., Ex. I (No. 37-12) at SO0142; see Pl.'s S.F. ¶¶ 13-14.) According to Assistant Superintendent Memoli, the discussion at that meeting involved "what we do for the students in this district, what is best for them so that we feel that we're treating everyone on an equal basis, what was educationally sound," (Defs.' Reply Br. in Support of Mot. for Summ. J. ("Defs.' Reply Br."), Ex. B (No. 45-4) at 53:5-15), and making sure that "no child feels uncomfortable in celebrating a holiday that wasn't their own," (id., Ex. B at 59:23-25). Assistant Superintendent Memoli stated that he "want[s] the students to feel comfortable when they're in this school system building and in their classroom; and, anything that makes them uncomfortable effects [sic] their ability to learn." (Id., Ex. B at 57:6-12.)

Director of Fine Arts Santoro drafted a memorandum to the School District music staff on October 29, 2004 (the "October 29, 2004 memorandum"), forwarding the decisions made at the October 14, 2004 meeting. (O'Neill Cert., Ex. I (No. 37-12) at SO0143; Pl.'s S.F. ¶ 19.) Director of Fine Arts Santoro wrote that "in my three-plus years in the district, I have been reviewing your programs to insure [sic] that we are in compliance with [Policy 2270],"[3]

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[3] Before 2004, Santoro did not object to any music on the basis of its content, including that performed during the December concerts. (Pl.'s S.F. ¶¶ 17-18.)

and that following the meeting, " I now have a clearer picture of the expectations of [Policy 2270]." (O'Neill Cert., Ex. I (No. 37-12) at SO0143; see Pl.'s S.F. ¶¶ 15-16.) Director of Fine Arts Santoro continued that "[i]n short, we will continue to use common sense when selecting music for the Holiday concerts," but also presented six specific bullet points:

- All programs will be reviewed and approved by me. To save time and effort, I will come to you to look at your repertoire. Please let me know when I can do this.

- We will avoid any selection which is considered to represent any religious holiday, be it Christmas, Hanukkah, etc. This holds true for any vocal or instrumental setting.

- I would strongly suggest you gear towards the seasonal selections -- Winter Wonderland, Frosty The Snowman, etc. Music centered on Peace is also a nice touch.

- For the High School, the Brass Ensemble repertoire must also adhere to this policy, so the traditional carols must be eliminated from the repertoire.

- The MKL [sic] Gospel Choir cannot perform at the CHS Holiday Assembly for the student body.

- Your printed programs for any Holiday concert must avoid graphics which refer to

> the holidays, such as Christmas Trees and dreidels.

(O'Neill Cert., Ex. I (No. 37-12) at SO0143; Pl.'s S.F. ¶¶ 20-22, 24-25.)

Following the issuance of the October 29, 2004 memorandum, Director of Fine Arts Santoro explained its contents in greater detail "when responding to direct inquiries from the faculty." (Defs.' Supporting Br. at 7.) As example, in response to an e-mail from music teacher Barbara Eames, Director of Fine Arts Santoro clarified that "according to the policy, you can teach about the different holidays in your music classes" as "[c]lassroom work is not a 'program'" within the meaning of Policy 2270. (O'Neill Cert., Ex. J (No. 37-13).) In response to another e-mail from Ms. Eames, Director of Fine Arts Santoro indicated that Vivaldi Gloria (Cum Sancto Spiritu) could be performed under Policy 2270 because "[t]he program does not have a religious orientation and it does not refer to a holiday." (Id., Ex. K (No. 37-14).) Further, Director of Fine Arts Santoro noted that Ms. Eames "CAN teach about the holidays in class as it is presented in [Policy 2270]." (Id.)

In addition, Director of Fine Arts Santoro began to receive programs from the School District music staff in order to determine whether they were in accord with Policy 2270. As example, on November 16, 2004, Mr. Cook sent Director of Fine Arts Santoro a letter with the following message:

> Nick:

For the Holi...uh, Ram...uh, Hanuk...uh, Chri...uh, December concert the 7th & 8th grade Orchestras at SOMS and MMS will be performing the following:

The Star Spangled Banner by Key
The Great Gate of Kiev by Mussorgsky
Hava Nagila - traditional
Concerto in D by JS Bach
Winter Wonderland (maybe) by Smith and Bernard

I will try to keep all references to the birth of You Know Who, the 8 days of You Know What and the R Month to a minimum.

Thank you for your consideration.

(Pl.'s Mot for Summ. J., Ex. C (No. 36-6), Ex. 8.) On November 17, 2004, John DeVita, faculty advisor for the MLK Gospel Choir, sent a memorandum to Director of Fine Arts Santoro proposing "to sing the first verse of 'Lift Every Voice and Sing' in honor of Quanza (a non religious holiday)" and including the lyrics. (Id., Ex. M (No. 36-19) at S00479.)

During November and December 2004, the School District received a number of complaints from members of the South Orange and Maplewood, New Jersey community, (id., Exs. F (Nos. 36-10 & 36-11), Exs. P-11 - P-12, P-57, P-62 - P-65, P-67 & K (No. 36-17)), including from the South Orange Village

President, (id., Ex. F (No. 36-10), Ex. P-13).[4] In addition, members of the community lodged complaints during meetings of the School Board on November 15 and 22, 2004. (Id., Exs. H (No. 36-13) & J (No. 36-16).) Seventeen members of the Maplewood, New Jersey community signed a "Petition Asking the Board of Education to Honor Religious Tolerance." (Id., Ex. F (No. 36-11), P-78.) On November 22, 2004, the co-Presidents of the Columbia High School Music Parents' Association sent a letter to Superintendent Horoschak and the School Board "formally request[ing] a review and reinterpretation" of Policy 2270. (Id., Ex. F, Ex. P-68.) "The district's music teachers" addressed a letter to Superintendent Horoschak and the School Board on November 23, 2004, "to express their extreme concern and their intense opposition to the change in the interpretation of the district's holiday music policy." (Id., Ex. F, Ex. P-66.) A "posting" by an individual identified as "Albatross" and "a graduate of Columbia[] [High School's] music program," indicated that the Columbia High School Brass Ensemble's "repertoire is maybe 90% works attached to either Christmas or Channukah," and as a result, "**[t]he remaining repertoire is not sufficient to satisfy the performance requirements of a holiday brass group,**" (id., Ex. E (No. 36-8), Ex. P-6), a contention with which Director of Fine Arts Santoro agreed, (id., Ex. E at 56:18-57:4). And, "[t]he members and advisors of the Martin Luther King Jr. Association Gospel Choir," which was now restricted from

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[4] Additionally, the School District received letters and e-mails from around the country, mostly during the period between November and December 2004. (Pl.'s Mot. for Summ. J., Ex. F (Nos. 36-10 & 36-11), Exs. P-15 - P-20, P-22 - P-52, P-71.)

performing at the Columbia High School December concert, despite having done so in the past, noted its objection in a December 1, 2004 letter. (Id., Ex. F (No. 36-10), Ex. P-14.) Steve Lonegan, the mayor of Bogota, New Jersey, contacted Superintendent Horoschak on December 16, 2004, to request "permission to assemble people on the street outside of Columbia High School on December 21, 2004 at 5:00 PM for a festive presentation of traditional Christmas Carols and Hanukkah Hymns." (Id., Ex. F (No. 36-11), Ex. P-53; see id., Ex. F, Exs. P-55 - P-56.) Superintendent Horoschak denied Mr. Lonegan his permission. (Id., Ex. F, Ex. P-55.)

According to the programs of concerts during and after 2004, songs with religious content that have been performed in the School District include – (1) Concerto VIII Fatto per la notte de natale; (2) Wade in the Water; (3) Waters of Babylon; (4) Agnus Dei/Cum Sanctis; (5) Laudamus Te; (6) Jubilate; (7) Ich will dem Hern; and (8) Cum Sancto Spiritu. (Defs.' Supporting Br. at 9; see O'Neill Cert., Exs. M (37-16) & N (37-17).) According to Mr. Cook, Policy 2270 "didn't prohibit all religious music," but only "prohibited music based on – or themes familiar – or themes consistent with pieces commonly associated with the holiday at the time of the holiday."[5] (Pl.'s Mot. for Summ. J., Ex. C (No. 36-6) at 77:6-12; see id., Ex. C at 73:6-12.) Music teachers have continued to teach holiday songs that used to be performed in the December concerts in their

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[5] Director of Fine Arts Santoro also stated that songs celebrating "a non-religious holiday," such as Kwanza purportedly is, can be performed during the December concerts. (Pl.'s Mot. for Summ. J., Ex. E (No. 36-8) at 35:19-36:2.)

classrooms, as well as other holiday music such as the "Nutcracker." (Id., Ex. I (36-14) at 43:5-18; O'Neill Cert., Ex. L (No. 37-15) at 43:5-44:7.) Director of Fine Arts Santoro confirmed that "[i]n performance concerts [certain] selections would not be allowed," but "[i]n the curriculum they would be allowed to be taught." (O'Neill Cert., Ex. H (No. 37-11) at 32:8-13.)

Director of Fine Arts Santoro continues to review programs for the December concerts. As example, on November 29, 2005, he received the following e-mail from music teacher Vern Miller:

> Hi Nick,
>
> Both Middle School Bands and Orchestras will be joyantly performing the following pieces:
>
> 1. Oh, Holy Night
> 2. Angels We Have Heard On High
> 3. We Three Kings
>
> We will be joined by the school choruses singing these selections while we play.
>
> Additionally, all performances will begin with a prayer and reading from the Holy scriptures.
>
> THOUGHT YOU MIGHT APPRECIATE OUR EFFORTS TO COMPLY WITH THE BOARD'S HOLIDAY MUSIC POLICY!!!
>
> In truth,
>
> MMS Concert: Monday, Dec 12th, 9:30 a.m.
> Winter Wonderland
> Dorian Rhapsody

Sing, Sing, Sing

SOMS Concert: Tuesday, Dec 13th, 9:30 a.m.
Winter Wonderland
Dorian Rhapsody

(Pl.'s Mot. for Summ. J., Ex. C (No. 36-6), Ex. 9.)

On October 10, 2005, the School Board adopted a new Policy 2270, Religion in the Schools, which is identical to the old Policy 2270, aside from its exclusion of this language – "Music programs prepared or presented by student groups as an outcome of the curriculum shall not have a religious orientation or focus on religious holidays." (See O'Neill Cert., Ex. O (No. 37-18) at SO0148.) In addition, on that same date, the School District's administration adopted Regulation 2270, Religion in the Schools, to implement the new Policy 2270. Regulation 2270 includes headings such as "Teaching of Religion as Part of the Curriculum," "Religion as part of the Music and Art Curricula," and "Celebration of Religious Holidays Prohibited." (Id., Ex. P (No. 37-19).)

Plaintiff filed his Complaint in this action on December 14, 2004, and his Amended Complaint on March 22, 2005. Plaintiff alleges a civil rights violation under the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983, asserting that "Defendants have conveyed the impermissible, government-sponsored message of disapproval of and hostility toward religion, including Christianity, in violation of the Establishment Clause," (the "Establishment Clause claim"), (Am. Compl. (No. 5) ¶ 21), and that "Defendants have unconstitutionally deprived Plaintiff and his minor children of their right

to receive information and ideas, their right to learn, and their right to academic freedom, which are guaranteed under the First Amendment" (the "First Amendment claim"),[6] (id. ¶ 24).

On May 16, 2005, Defendants filed a motion to dismiss, which the Court granted on September 29, 2005. Upon consideration, over Plaintiff's objection, of Policy 2270, the Court concluded that "Plaintiff[] ha[s] not alleged any facts that if established would entitle [him] to any relief under the Establishment Clause" and that Plaintiff's claim under the First Amendment as to his children's right to receive information and ideas should be dismissed. (Op. (No. 13) at 16, 17.) On October 5, 2006, the Third Circuit vacated the Court's September 29, 2005 Order and remanded the case for further proceedings. The Third Circuit objected to the Court's consideration of Policy 2270, noting that "the policy Stratechuk describes is more restrictive than the one set forth in the publicly available materials" meaning that "the official policy was not 'integral to or explicitly relied upon in the complaint.'" Stratechuk v. Bd. of Educ., 200 Fed. Appx. 91, 94 (3d Cir. 2006). The Third Circuit held that "a categorical ban on exclusively religious music, enacted with the express purpose of sending a message of disapproval of religion, appears to state a claim under the First Amendment." Id.

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[6] The Court recognizes that the Establishment Clause is as much a part of the First Amendment as the "right to receive information and ideas, the[] right to learn, and the[] right to academic freedom." For ease, however, the Court will refer to Plaintiff's non-Establishment Clause claim as the "First Amendment claim."

Plaintiff filed his motion for summary judgment on January 10, 2008, followed by Defendants' motion for summary judgment on January 11, 2008, and the Court held oral argument on the two motions on July 31, 2008.

LEGAL STANDARD

Summary judgment is appropriate where the moving party establishes that "there is no genuine issue as to any material fact and that [it] is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A factual dispute between the parties will not defeat a motion for summary judgment unless it is both genuine and material. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 106 S. Ct. 2505, 2510 (1986). A factual dispute is genuine if a reasonable jury could return a verdict for the non-moving party, and it is material if, under the substantive law, it would affect the outcome of the suit. Id. at 248. The moving party "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986).

Once the moving party has carried its burden under Rule 56, "its opponent must do more than simply show that there is some metaphysical doubt as to the material facts in question." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 1356 (1986). To survive a motion for summary judgment, the non-moving party must

present more than a mere scintilla of evidence in his favor. Woloszyn v. County of Lawrence, 396 F.3d 314, 319 (3d Cir. 2005). The non-moving party must go beyond the pleadings and, by affidavits or other evidence, designate specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); Celotex, 477 U.S. at 324. "Conclusory statements, general denials, and factual allegations not based on personal knowledge [are] insufficient to avoid summary judgment." Olympic Junior, Inc. v. David Crystal, Inc., 463 F.2d 1141, 1146 (3d Cir. 1972).

At the summary judgment stage the court's function is not to weigh the evidence and determine the truth of the matter, but rather to determine whether there is a genuine issue for trial. Anderson, 477 U.S. at 249. In doing so, the court must construe the facts and inferences in the light most favorable to the non-moving party. Id. at 255; Curley v. Klem, 298 F.3d 271, 276-77 (3d Cir. 2002).

DISCUSSION

There is no genuine issue of material fact(s) between the parties.[7] There are intense clashes

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[7] There is a dispute between Plaintiff Michael Stratechuk and Defendants as to the source of the policy restricting the performance of holiday music during the December concerts. Plaintiff asserts that he has no issue with Policy 2270, and instead, his issue is with the October 29, 2004 memorandum, which he claims created an entirely new policy with respect to the performance of holiday music during the December concerts. Defendants, however, argue that the October 29, 2004 memorandum simply presented an interpretation of certain language that was already a part of Policy 2270 – i.e., "[m]usic

between them as to the legal import and significance of the undisputed facts.

The Supreme Court "has long recognized that local school boards have broad discretion in the management of school affairs." Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 863, 102 S. Ct. 2799, 2806 (1982). As a result, "[c]ourts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values." Epperson v. Arkansas, 393 U.S. 97, 104, 89 S. Ct. 266, 270 (1968).

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programs prepared or presented by student groups as an outcome of the curriculum shall not have a religious orientation or focus on religious holidays."

The Court finds that the source of the policy restricting the performance of holiday music during the December concerts is Policy 2270, viewed through the interpretive lens of the October 29, 2004 memorandum. The October 29, 2004 memorandum was an outgrowth of the October 14, 2004 meeting. The purpose of that meeting was "to review the requirements of Policy 2270 . . . and to resolve various parent concerns regarding the implementation of the policy." (O'Neill Cert., Ex. I (No. 37-12) at SO0142.) Although the meaning of the terms "focus on religious holidays" changed after the October 14, 2004 meeting and the issuance of the October 29, 2004 memorandum, Policy 2270 still remained the source of the School District's policy regarding the performance of holiday music during the December concerts. The October 29, 2004 memorandum simply presented the reinterpretation of Policy 2270, as agreed to during the October 14, 2004 meeting.

Hereinafter, the Court will refer to the policy restricting the performance of holiday music during the December concerts as the "reinterpretation of Policy 2270."

Courts, however, must not ignore that "'[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'" Id. (quoting Shelton v. Tucker, 364 U.S. 479, 487, 81 S. Ct. 247, 251 (1960)).

Plaintiff Michael Stratechuk asserts that the interpretation of Policy 2270 violates his children's rights under the Establishment Clause and "their right to receive information and ideas, their right to learn, and their right to academic freedom" in violation of the First Amendment, necessitating this Court to overcome the deference that it would traditionally give to decisions of a local school board. The Court concludes, however, that the interpretation of Policy 2270 does not violate the Establishment Clause or Plaintiff's children's other First Amendment rights.

1. The Establishment Clause Claim

Plaintiff's first claim is that the interpretation of Policy 2270 violates the Establishment Clause because it "convey[s] the impermissible, government-sponsored message of disapproval of and hostility toward religion." According to the Establishment Clause, "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. Contained within this Clause is "the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general," Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532, 113 S. Ct. 2217, 2226 (1993), as "[t]he First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." Epperson, 393 U.S. at 104.

To analyze a claim under the Establishment Clause, courts have traditionally utilized the three-pronged test first articulated by the Supreme Court in Lemon v. Kurtzman, 403 U.S. 602, 91 S. Ct. 2105 (1971).[8] Under the Lemon test, a state action

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[8] Although the Lemon test has been repeatedly criticized, see, e.g., Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398-99, 113 S. Ct. 2141, 2150-51 (1993) (Scalia, J., concurring) (likening Lemon to "some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried"), it still remains a viable test for determining whether a governmental action violates the Establishment Clause, see McCreary County, Ky. v. Am. Civil Liberties Union of Ky., 545 U.S. 844, 859-67, 125 S. Ct. 2722, 2732-37 (2005) (referencing Lemon's purpose prong), Borden v. Sch. Dist. of the Twp. of E. Brunswick, 523 F.3d 153, 175 (3d Cir. 2008) (listing the Lemon test as one of three tests for determining whether governmental action violates the Establishment Clause). Additionally, courts have utilized two other tests – the coercion test and the endorsement test – to analyze Establishment Clause claims. Despite the existence of these other tests, however, the Court concludes that the Lemon test is the most appropriate for determining whether the interpretation of Policy 2270 violates the Establishment Clause.

"The coercion test looks at whether the government is 'coerc[ing] anyone to support or participate in religion or its exercise.'" Borden, 523 F.3d at 175 n.18 (quoting Lee v. Weisman, 505 U.S. 577, 587, 112 S. Ct. 2649, 2655 (1992)). Although the coercion test "focuses primarily on government action in public education," Modrovich v. Allegheny County, Pa., 385 F.3d 397, 400-01 (3d Cir. 2004), it is inapplicable to this matter because Plaintiff does not allege that the interpretation of Policy 2270 has had a coercive effect on his children.

"The endorsement test . . . asks whether a reasonable observer familiar with the history and context of [a] display would perceive [a] display as a government endorsement of religion." Id. at 401. Despite an earlier Third Circuit opinion limiting the endorsement

violates the Establishment Clause if any of the following are true – (1) it lacks a secular purpose; (2) its principal or primary effect advances or inhibits religion; or (3) it fosters an excessive entanglement with religion. 403 U.S. at 612-13.

A. "Purpose" Prong

"In applying the purpose [prong], it is appropriate to ask 'whether government's actual purpose is to endorse or disapprove of religion.'" Wallace v. Jaffree, 472 U.S. 38, 56, 105 S. Ct. 2479, 2489 (1985). "[T]he purpose prong of Lemon only requires some secular purpose, and not 'that the purposes . . . are 'exclusively secular.'" Freethought Soc'y of Greater Phila. v. Chester County, 334 F.3d 247, 262 (3d Cir. 2003) (quoting Lynch v. Donnelly, 465 U.S. 668, 681 n.6, 104 S. Ct. 1355, 1363 n.6 (1984)). Accordingly, the Supreme Court "has invalidated legislation or governmental action on the ground that a secular purpose was lacking . . . only when it has concluded there was no question that the statute or activity was motivated wholly by religious considerations." Lynch, 465 U.S. at 680.

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test to "cases involving religious displays on government property," id., 385 F.3d at 401; see Freethought Soc'y of Greater Phila. v. Chester County, 334 F.3d 247, 250, 257, 258 (3d Cir. 2003); Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly, 309 F.3d 144, 174 (3d Cir. 2002), the Third Circuit later stated generally that "[t]he endorsement test applies '[i]n cases involving state participation in a religious activity,'" Borden, 523 F.3d at 175 (quoting Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308, 120 S. Ct. 2266, 2278 (2000)). Regardless of the expansiveness of the applicability of the endorsement test, however, the Court concludes that this matter does not involve a religious display on government property or state participation in a religious activity.

But, "[w]hile the Court is normally deferential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham," Edwards v. Aguillard, 482 U.S. 578, 586-87, 107 S. Ct. 2573, 2579 (1987), because the purpose prong is not "a pushover for any secular claim," McCreary County, Ky. v. Am. Civil Liberties Union of Ky., 545 U.S. 844, 864, 125 S. Ct. 2722, 2736 (2005). "The eyes that look to purpose belong to an "objective observer," one who takes account of the traditional external signs that show up in the "text, legislative history, and implementation of the statute," or comparable official act." Id. at 862. Overall, however, the Third Circuit has stated that the purpose prong is "a 'low threshold,' and courts are generally deferential to the government's proffered secular purpose as long as it is legitimate." Modrovich v. Allegheny County, Pa., 385 F.3d 397, 411 (3d Cir. 2004) (quoting Freethought, 334 F.3d at 267).

Defendants assert that "[t]he performing of celebratory religious music at school-sponsored events is prohibited because such performances are not necessary to achieve the specific goals of the music curriculum and could be perceived as an overt endorsement of religion or an improper focus on religious holidays." (Defs.' Br. in Opp. to Pl.'s Mot. for Summ. J. (No. 43) ("Defs.' Opp. Br.") at 5-6, 8, 12-13.) In other words, Defendants contend that "[t]he Policy, as written and currently interpreted, is clearly designed with the goal of avoiding potential Establishment Clause violations." (Defs.' Supporting Br. at 18.)

Plaintiff responds, however, that "there is no requirement under the Establishment Clause that the

School District ban such music, including Christmas music during the Christmas holiday, from its curricular, co-curricular, or extracurricular activities and events," which "evidence[s] . . . the School District's illicit purpose." (Pl.'s Br. in Support of Mot. for Summ. J. (No. 36-3) ("Pl.'s Supporting Br.") at 34; Pl.'s Br. in Opp. to Def.'s Mot. for Summ. J. (No. 39) ("Pl.'s Opp. Br.") at 32-33; see id. at 14 ("[T]he School District's claimed purpose of 'avoiding potential Establishment Clause violations' in light of the evidence and the well-established case law regarding religious music is plainly a 'sham.'").) Plaintiff concludes that "the School District's policy targets certain music for disfavored treatment ***because it is religious or because it is associated with a religious holiday***." (Pl.'s Supporting Br. at 17, 30, Pl.'s Opp. Br. at 16; Pl.'s Reply Br. in Support of Mot. for Summ. J. (No. 44) ("Pl.'s Reply Br.") at 10.)

As an initial matter, the Court does not dispute Plaintiff's contention that the interpretation of Policy 2270 targets certain music "***because it is associated with a religious holiday***."[9] That fact, however, is

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[9] The Court, however, does question Plaintiff's contention that the interpretation of Policy 2270 targets certain music simply "***because it is religious***." Such a statement does not accord with the text of Policy 2270, which "[p]ermits the inclusion of religious literature, music, drama, dance and visual arts in the curriculum" and which stipulates that "[r]eligious music, like any other music, can only be used if it achieves specific goals of the music curriculum." (O'Neill Cert., Ex. A (No. 37-4) at SO0140-41.) Furthermore, it ignores that performances of religious songs such as Concerto VIII Fatto per la notte de natale, Wade in the Water, Waters of Babylon, Agnus Dei/Cum Sanctis, Laudamus Te, Jubilate, Ich will dem Hern, and Cum Sancto Spiritu have continued, (Defs.' Supporting Br. at 9, see O'Neill Cert., Exs. M

not incompatible with Defendants' stated purpose, nor does it presuppose the conclusion that Defendants' actual purpose is simply to show disapproval of religion. And, Plaintiff has not provided any evidentiary support for his naked assertion that the purpose underlying Defendants' actions was to show disapproval of religion.

Actions taken to avoid potential Establishment Clause violations have a valid secular purpose under the purpose prong of the Lemon test. See, e.g., Vasquez v. Los Angeles ("LA") County, 487 F.3d 1246, 1255 (9th Cir. 2007); Bishop v. Aronov, 926 F.2d 1066, 1077 (11th Cir. 1991); Roberts v. Madigan, 921 F.2d 1047, 1054 (10th Cir. 1990); cf. Borden v. Sch. Dist. of the Twp. of E. Brunswick, 523 F.3d 153, 174 (3d Cir. 2008) ("The Supreme Court has stated that 'compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech.'"). Plaintiff, however, argues that Establishment Clause caselaw definitively holds that Defendants need not have placed restrictions on the performance of holiday music at the December concerts, undermining Defendants' stated purpose and thereby rendering that purpose a sham. Establishment Clause jurisprudence, however, defies such a categorical claim. "The Establishment Clause . . . is not a precise, detailed provision in a legal code capable

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(37-16) & N (37-17)), in accordance with Policy 2270, (see Pl.'s Mot. for Summ. J., Ex. C (No. 36-6) at 77:6-12), and that music teachers have continued teaching holiday songs that used to be performed in the December concerts in their classrooms, (id., Ex. I (36-14) at 43:5-10; O'Neill Cert., Ex. L (No. 37-15) at 43:5-10), in accordance with Policy 2270, (see O'Neill Cert., Ex. H (No. 37-11) at 32:8-13).

of ready application." Lynch, 465 U.S. at 678. Instead, it "is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship," Lemon, 403 U.S. at 614, meaning that "each case . . . calls for line drawing" and that "no fixed, per se rule can be framed," Lynch, 465 U.S. at 678. It is unclear whether in the specific circumstances presented in this case, the performance of religious holiday music at the December concerts would violate the Establishment Clause, and the Court declines to render an opinion as to that issue. Accordingly, given the uncertainty inherent in all Establishment Clause-related decisions, the Court concludes that Defendants' stated purpose is not a sham.

Assuming that the Establishment Clause does not require the restrictions enacted by Defendants, however, does not automatically render Defendants' stated purpose a "sham." Evidence suggests that the interpretation of Policy 2270 was spurred by at least one parent's complaint. (See Decl. of Attorney Robert J. Muise (No. 38), Ex. P-5 at S00212-13.) Superintendent Horoschak stated that in his annual performance review where the interpretation of Policy 2270 was considered, it was noted that "you really can't balance all religious groups in these representations in these types of performances." (O'Neill Cert., Ex. B (No. 37-5) at 113:9-11.) And, Assistant Superintendent Memoli indicated that the discussion at the October 14, 2004 meeting revolved around doing "what is best for [the students] so that we feel that we're treating everyone on an equal basis," (Defs.' Reply Br., Ex. B (No. 45-4) at 53:7-10), and making sure that "no child feels uncomfortable in celebrating a holiday that wasn't their own," (id., Ex.

B at 59:23-25). As such even if the Establishment Clause does not necessitate Defendants' actions, the evidence convinces the Court that Defendants' actions were motivated by their professed purpose of prevention of an overt endorsement of religion or an improper focus on religious holidays.

Despite assertions to the contrary, Plaintiff has presented no evidence to support his claim that Defendants' stated purpose was a sham. Moreover, Plaintiff has presented no evidence to support the notion that the purpose behind Defendants' interpretation of Policy 2270 was to show disapproval of religion. In contrast, there is ample evidence to support Defendants' claim that the purpose of the interpretation of Policy 2270 was to prevent an overt endorsement of religion or an improper focus on religious holidays. As a result the Court is satisfied that the interpretation of Policy 2270 had a secular purpose.[10]

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[10] Plaintiff also claims that "based on the totality of the evidence, the only reasonable inference is that the purpose of this policy was to specifically ban the performance of *Christmas* music." (Pl.'s Supporting Br. at 17; Pl.'s Opp. Br. at 17.) Plaintiff believes that "[w]ithout question, Christmas was the target of this policy from its inception" because "Ms. Cohen, the close acquaintance of former board member Shelly Slafkes and the parent who lodged the initial complaint that started the policy revision process, was opposed to *Christmas* religious music." (Pl.'s Supporting Br. at 17; Pl.'s Opp. Br. at 17.) Defendants respond that "Policy 2270 is religiously neutral and bans the performance of *any* religious music which is celebratory of religious holidays," noting that "Hanukkah music, for example, is included within the ban." (Defs.' Opp. Br. at 7-8.)

According to the Supreme Court, "[i]f someone in the

B. "Effect" Prong

"The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval." Lynch, 465 U.S. at 690 (O'Connor, J., concurring). Accordingly, courts "must determine whether, under the totality of the circumstances, the challenged practice conveys a message favoring or disfavoring religion." Am. Civil Liberties Union of N.J. v. Black Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471, 1486 (3d Cir. 1996). In analyzing a governmental action under the effect prong, the perspective is that of the "reasonable observer." Id. Courts must look to "the 'history and ubiquity' of a practice . . . because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement" or disapproval of religion. County of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter, 492

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government hides religious motive so well that the "objective observer, acquainted with the text, legislative history, and implementation of the statute," . . . cannot see it, then without something more the government does not make a divisive announcement that in itself amounts to taking religious sides." McCreary, 545 U.S. at 863 (internal citation omitted). The text of Policy 2270 states that "[m]usic programs prepared or presented by student groups as an outcome of the curriculum shall not have a religious orientation or focus on religious holidays." (O'Neill Cert., Ex. A (No. 37-4) at SO0141.) The October 29, 2004 memorandum provides that "[w]e will avoid any selection which is considered to represent any religious holiday, be it Christmas, Hanukkah, etc." (Id., Ex. I (No. 37-12) at SO0143.) The broad applicability of the interpretation of Policy 2270 undermines Plaintiff's argument that its purpose is specifically to ban Christmas music.

U.S. 573, 630, 109 S. Ct. 3086, 3121 (1989) (O'Connor, J., concurring in part and concurring in judgment).

Plaintiff argues that "[t]he clear effect of the School District's policy is to show disapproval of religion in violation of the Establishment Clause." (Pl.'s Supporting Br. at 24.) Plaintiff notes that "the reasonable observer would know that the School District has adopted and enforces an official policy that bans only religious music or music associated with a religious holiday and that it was implemented to ban students and student groups from playing traditional Christmas music . . . at various event during the 2004 Christmas holiday season," that "the MLK Gospel Choir was permitted in the past to perform traditional Christmas religious music at the Columbia High School Holiday Assembly but has now been banned from performing at this event," that "the high school brass ensemble has been banned from performing any traditional Christmas songs and carols . . . at these concerts," and that "it is permissible, from a constitutional perspective, for a school district to allow religious music, including Christmas music, in its public schools and at other school-sanctioned events." (Id. at 36-37; Pl.'s Opp. Br. at 34-35.) Moreover, according to Plaintiff, "the public perception and reaction to the policy and its implementation demonstrate that the challenged policy was '*sufficiently likely to be perceived*' by the community as a 'disapproval' of religion, irrespective of the School District's alleged purpose for adopting it." (Pl.'s Supporting Br. at 20.)

Defendants assert that "it is clear that the effect of the defendants' current policy is one that encourages and promotes complete religious neutrality, neither

favoring nor demonstrating hostility toward religion." (Defs.' Opp. Br. at 14.) According to Defendants, "[t]he narrow restrictions placed upon the performances by the MLK Gospel Choir and the high school brass ensembles are grounded in this policy of complete religious neutrality and are reasonable and limited in their scope." (Id.)

The Court agrees that before the interpretation of Policy 2270 in 2004, certain religious holiday music was performed at the December concerts, including by the Columbia High School Brass Ensemble, and the MLK Gospel Choir participated in the concerts. To be sure, wholesale changes to the programs of the December concerts alone and without more might send a message of disapproval to the reasonable observer. The Court also acknowledges the complaints by members of the community, and by the "district music teachers." Such complaints, if informed by "the totality of the circumstances," may assist the Court in its consideration of the perspective of the reasonable observer.[11] The Court, however, finds that there is ample evidence available to the objective observer regarding the interpretation of Policy 2270 in the totality of circumstances, which removes any claim that it conveys a message of disapproval of religion.

The text of Policy 2270 clearly indicates an effort to include religious material when appropriate, provided that it is presented objectively and that it fits within the curriculum. In its introductory section, Policy

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[11] These complainants, however, may not serve as proxies for the reasonable observer, as it is unclear of the extent of their knowledge of the totality of the circumstances.

2270 states that "[w]e are cognizant of the role of culture, including religion, in the development of our society and believe that objectively teaching about religion and its role in the social and historical development of civilization does not violate the religious neutrality of the public schools." (O'Neill Cert., Ex. A (No. 37-4) at SO0140.) With respect to curricular objectives, Policy 2270 "[p]ermits the inclusion of religious literature, music, drama, dance and visual arts in the curriculum provided that it achieves specific goals of the written curriculum in the various fields of study; that it is presented objectively; and that it neither inhibits nor advances any religious point of view." (Id.) In particular, Policy 2270 requires "[a]ccommodat[ion of] student-initiated expression in response to questions or assignments which reflect their beliefs or non-beliefs about religious themes" and "permit[s] religious symbols to teach about historical or cultural context." (Id.) When specifically dealing with religious holidays, Policy 2270 directs that "opportunities to learn about cultural and religious traditions should be provided within the framework of the curriculum." (Id., Ex. A at SO0141.) Moreover, Policy 2270 allows for the use of religious music, provided "it achieves specific goals of the music curriculum." (Id.)

There is no doubt that the text of Policy 2270 also places restrictions on religion. Religious symbols are not permitted "to promote or celebrate religious concepts, events or holidays." (Id., Ex. A at SO0140.) "Decorations with religious significance are not permitted." (Id., Ex. A at SO0141.) And, of importance to this matter, "[m]usic programs prepared or presented by student groups as an outcome of the curriculum shall not have a religious orientation or

focus on religious holidays." (Id.) These restrictions, are tailored to ensure the objective presentation of religion and to confine religion to the educational curriculum. As a result, the objective observer, armed with knowledge of both Policy 2270's accommodations to religion and restrictions on religion, would not conclude that the text of Policy 2270 sends a message of disapproval of religion.[12]

The implementation of Policy 2270 reinforces this conclusion, particularly regarding the School District's treatment of religious music. Although the interpretation of Policy 2270 restricts the performance of holiday music during the December concerts, music teachers have indicated that they continue to teach those songs in the classroom, (see Pl.'s Mot. for Summ. J., Ex. I (No. 36-14) at 43:5-10; O'Neill Cert., Ex. L (No. 37-15) at 43:5-10), and Director of Fine Arts Santoro has confirmed the appropriateness of this practice, (O'Neill Cert., Ex. H (No. 37-11) at 32:8-13; O'Neill Cert., Ex. J (No. 37-13)).[13] The interpretation of Policy

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[12] In fact, it is most likely that the objective observer would conclude that the text of Policy 2270 sends a message of neutrality towards religion. Statements such as "[t]he use and/or display of religious symbols should provide an environment whereby students of all faiths, beliefs or non-beliefs can participate without betraying their own faith or beliefs" and "special effort must be made to ensure the activity is not devotional and that pupils of all faiths and beliefs can join without feeling they are betraying their own faith or beliefs," (O'Neill Cert., Ex. A (No. 37-4) at S00141), reveal a sensitivity towards ensuring that the School District maintains complete neutrality in matters of religion.

[13] The Court recognizes that the implementation of Policy 2270 could indirectly influence curricular decisions made by the School District's music staff because the programs performed during the

2270 also has not affected the performance of songs with religious content such as Concerto VIII Fatto per la notte de natale, Wade in the Water, Waters of Babylon, Agnus Dei/Cum Sanctis, Laudamus Te, Jubilate, Ich will dem Hern, and Cum Sancto Spiritu. (Defs.' Supporting Br. at 9; see O'Neill Cert., Exs. M (37-16) & N (37-17).) It simply restricts the performance of holiday music at the time of the religious holiday that the music honors. (Pl.'s Mot. for Summ. J., Ex. C (No. 36-6) at 77:6-12.) Given the continued performance of religious songs and the continued teaching of holiday music in the classroom, the objective observer would not determine that the implementation of Policy 2270, with respect to the School District's treatment of religious music, sends a message of disapproval of religion.

The content of the discussions leading to the interpretation of Policy 2270 further undermine any arguments that it conveys a message of disapproval of religion. At Superintendent Horoschak's annual performance review, the School Board raised concerns that "you really can't balance all religious groups in these representations in these types of performances." (O'Neill Cert., Ex. B (No. 37-5) at 113:9-11.) Assistant Superintendent Memoli stated that discussion at the October 14, 2004 meeting involved ensuring that the administration is "treating everyone on an equal basis," (Defs.' Reply Br., Ex. B (No. 45-4) at 53:7-10), and that "no child feels uncomfortable in celebrating a

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December concerts are typically an outgrowth of the curriculum. The Court, however, is unaware of any evidence indicating that the implementation of Policy 2270 has actually had an effect on the curriculum or, if it has, the magnitude of that effect.

holiday that wasn't their own," (id., Ex. B at 59:23-25). The evidence suggests that had the objective observer attended Superintendent Horoschak's annual performance review or the October 14, 2004 meeting, he would have likely concluded that the interpretation of Policy 2270 conveys neutrality towards religion, not disapproval of religion.

The interpretation of Policy 2270 expressly restricts the performance of holiday music, which changed earlier practices within the School District. This result, however, does not automatically convey a message of disapproval of religion because as the Supreme Court observed in County of Allegheny, "[a] secular state, it must be remembered, is not the same as an atheistic or antireligious state." 492 U.S. at 610. By emphasizing the objective presentation of religion within the confines of the curriculum, continuing to allow the performance of religious music that does not focus on a particular holiday and to teach all religious music, even holiday music, inside the classroom, and acting on concerns of maintaining the appearance of neutrality within the School District, Defendants do not convey a message of disapproval of religion through the interpretation of Policy 2270.

C. "Excessive Entanglement" Prong

"There is no exact science in gauging the entanglement of church and state." Roemer v. Bd. of Pub. Works of Md., 426 U.S. 736, 766, 96 S. Ct. 2337, 2354 (1976). But, "[a]n entanglement must be "excessive' before it runs afoul of the Establishment Clause,' and this requires more than mere '[i]nteraction between church and state,' for some level of interaction has always been 'tolerated.'" Child

Evangelism Fellowship of N.J. Inc. v. Stafford Twp. Sch. Dist., 386 F.3d 514, 534 (3d Cir. 2004) (quoting Agostini v. Felton, 521 U.S. 203, 233, 117 S. Ct. 1997, 2015 (1997)). According to the Supreme Court, "the factors we use to assess whether an entanglement is 'excessive' are similar to the factors we use to examine 'effect.'" Agostini, 521 U.S. at 232.

According to Plaintiff, "school officials will be required to screen music to determine whether it is religious or secular in nature," and "[d]rawing such distinctions between secular and religious themes will necessarily cause an entanglement with religion." (Pl.'s Supporting Br. at 37-38; Pl.'s Opp. Br. at 35-36.) Plaintiff concludes that "rather than making distinctions based on criteria related to learning and education, the School District is making distinctions based purely on ***religious criteria*** . . . thereby creating an impermissible entanglement." (Pl.'s Opp. Br. at 37.)

Defendants argue that "[t]he entire objective of the School District's current Policy is to avoid government entanglement with religion" and to "avoid becoming entangled in disputes and disagreements over the celebration of religious holidays, by maintaining a policy of complete religious neutrality when it comes to school sponsored assemblies and activities." (Defs.' Supporting Br. at 19-20.) Defendants maintain that "while enforcement of Policy 2270 has required some minimal screening of music selections, there is no suggestion in the record that the District's current policy has resulted in excessive entanglement issues." (Defs.' Opp. Br. at 17.)

Policy 2270 states that "[m]usic programs prepared or presented by student groups as an outcome of the curriculum shall not have a religious orientation or focus on religious holidays." (O'Neill Cert., Ex. A (No. 37-4) at SO0141.) The October 29, 2004 memorandum indicates that "[a]ll programs will be reviewed and approved" by Director of Fine Arts Santoro and instructs the School District music staff to "avoid any selection which is considered to represent any religious holiday." (Id., Ex. I (No. 37-12) at SO0143.) Clearly, this screening of musical selections required by the interpretation of Policy 2270 involves some entanglement with religion.

If the Court were to conclude that the interpretation of Policy 2270 fostered an excessive entanglement with religion, however, Defendants would find themselves in a "Catch-22" – an action taken specifically to avoid an Establishment Clause violation, in and of itself would cause an Establishment Clause violation. The Court is disinclined to prompt this predicament, particularly given that it would create the risk of an Establishment Clause violation every time that a governmental entity engaged in decisionmaking regarding a religious topic. The Establishment Clause "is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship," Lemon, 403 U.S. at 614, and governmental entities must feel free to navigate the hazy contours of the Establishment Clause in order to achieve the mandate of governmental neutrality.

Plaintiff characterizes the oversight that the interpretation of Policy 2270 requires as "[d]rawing . . . distinctions between secular and religious themes."

(Pl.'s Supporting Br. at 37-38; Pl.'s Opp. Br. at 36.) This type of oversight – this drawing of distinctions between secular and religious themes – strikes the Court as no different from the screening that school districts engage in every day to ensure neutrality in matters of religion. Indeed, a similar drawing of distinctions between secular and religious themes occurs within this School District with regard to the treatment of holidays in the classroom. (O'Neill Cert., Ex. A (No. 37-4) at SO0141 ("Religious holidays are not to be celebrated in the schools, except in the form of the secular nature of that holiday.").)

What the interpretation of Policy 2270, and Policy 2270 as a whole, seek to achieve is the objective presentation of religion within the School District; what they seek to avoid is the overt endorsement of religion within the same. Although accomplishment of these goals necessitates some involvement or entanglement with religion, such entanglement is not excessive. To conclude otherwise ignores the evidence and would undermine governmental efforts to comply with the Establishment Clause.

* * *

The Court finds that the interpretation of Policy 2270 has a valid secular purpose, does not convey a message of disapproval of religion, and does not foster an excessive entanglement with religion. The Court grants Defendants' motion for summary judgment and denies Plaintiff's motion for summary judgment with respect to the Establishment Clause claim.

2. The First Amendment Claim

Plaintiff's second claim is that the interpretation of Policy 2270 violates his children's right to receive information and ideas, right to learn, and right to academic freedom. The parties' arguments with respect to the First Amendment claim amount to a disagreement about the proper precedent upon which the Court should rely. According to Plaintiff, Board of Education, Island Trees Union Free School District No. 26 v. Pico, 457 U.S. 853, 102 S. Ct. 2799 (1982), serves as the starting point for the Court's analysis. Defendants, however, refer to Hazlewood School District v. Kuhlmeier, 484 U.S. 260, 108 S. Ct. 562 (1988), as the authority for the Court's consideration of the First Amendment claim.

When the Court addressed the First Amendment claim in its September 29, 2005 Opinion, it determined that Kuhlmeier was the appropriate precedent for this case. (Op. (No. 13) at 17.) Although the Third Circuit vacated the September 29, 2005 Order, its decision only specifically addressed the Court's conclusions with respect to the Establishment Clause claim and did not call into question the Court's holding regarding the First Amendment Claim. After reviewing the evidence presented for these motions for summary judgment, the Court sees no reason to deviate from its earlier conclusions regarding the First Amendment claim and holds that Kuhlmeier, not Pico, provides the framework for analysis of the First Amendment claim and that the interpretation of Policy 2270 does not violate Plaintiff's children's right to receive information and ideas, right to learn, and right to academic freedom.

A. Pico versus Kuhlmeier

Pico involves the constitutionality of a school board's decision to remove certain books from its school districts' libraries. 457 U.S. at 856-58. Kuhlmeier involves the constitutionality of a school principal's decision to delete two pages of student-written articles from a school newspaper. 484 U.S. at 262-64. When superficially comparing the two cases, Pico deals with the right to receive ideas, whereas Kuhlmeier deals with the right to express ideas. Because the First Amendment claim is based upon Plaintiff's children's right to receive information and ideas, right to learn, and right to academic freedom, as opposed to his children's right to perform holiday music, it appears that this case may align more closely with Pico. Pico, however, expressly limits its holding to its facts, whereas Kuhlmeier's holding reaches beyond the scope of its factual context.

At the outset of its plurality opinion, the Pico Court emphasizes "the limited nature of the substantive question presented by the case," 457 U.S. at 861-62, summarizing it in the following manner: "[D]oes the First Amendment impose any limitations upon the discretion of petitioners to remove library books," id. at 863? Pico then proceeds to discuss at great length "the special characteristics of the school library," id. at 868-69, and to reject arguments given "the unique role of the school library" and "the regime of voluntary inquiry that there holds sway" at the library, id. at 869. The Kuhlmeier Court, on the other hand, broadly describes the issue that it addresses as "whether the First Amendment requires a school affirmatively to promote particular student speech." 484 U.S. at 270-71. This issue, according to the Supreme Court,

"concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." Id. at 271.

The Court concludes that the December concerts are more appropriately characterized as "expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school," than compared with the school library. Accordingly, regardless of how Plaintiff presents his underlying rights, Kuhlmeier governs the issues raised in this case.[14]

B. Analysis Under Kuhlmeier

To analyze the interpretation of Policy 2270 under Kuhlmeier, the Court must first address the threshold issue of whether the December concerts are public

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[14] Even if the Court were to conclude that Pico was the appropriate precedent for this matter, however, the Court finds that the case does not support Plaintiff's position. According to the plurality opinion, "[o]ur Constitution does not permit the official suppression of ideas," so "[i]f petitioners intended by their removal decision to deny respondents access to ideas with which petitioners disagreed, and if this intent was the decisive factor in petitioners' decision, then petitioners have exercised their discretion in violation of the Constitution." Pico, 457 U.S. at 871. The Court has already concluded that the purpose underlying the interpretation of Policy 2270 was to prevent an overt endorsement of religion or an improper focus on religious holidays, not to show disapproval of religion. As such the interpretation of Policy 2270 was not intended to deny Plaintiff access to ideas with which Defendants disagreed and does not qualify as an official suppression of ideas.

fora. If the Court concludes that the December concerts are not public fora, the Court must then determine whether the interpretation of Policy 2270 is "reasonably related to legitimate pedagogical concerns."

i. Forum Analysis

According to the Kuhlmeier Court, "school facilities may be deemed to be public forums only if school authorities have 'by policy or by practice' opened those facilities 'for indiscriminate use by the general public' . . . or by some segment of the public, such as student organizations." Id. at 267 (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 47, 103 S. Ct. 948, 956 (1983)). On the other hand, "[i]f the facilities have instead been reserved for other intended purposes, 'communicative or otherwise,' then no public forum has been created, and school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community." Id.

The Court is not aware of any evidence indicating that "by policy or practice" the December concerts were open for "indiscriminate use by the general public." It appears that students were not free to come on stage to perform a musical number of their choice, as might be the case in a school-wide talent show. The School District's music staff carefully tailors the programs that the students perform, and Director of Fine Arts Santoro approves the programs ahead of time, a practice that he followed even before the interpretation of Policy 2270. The Court concludes that the December concerts are not public fora.

ii. Reasonable Relationship to Legitimate Pedagogical Concerns

When dealing with "school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school," "[e]ducators are entitled to exercise greater control over this . . . student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school." Id. at 271. Indeed, "[a] school must . . . retain the authority to refuse . . . to associate the school with any position other than neutrality on matters of political controversy." Id. at 272.

Because "[i]t is only when the decision to censor a school-sponsored publication, theatrical production, or other vehicle of student expression has no valid educational purpose that the First Amendment is so 'directly and sharply implicate[d]' . . . as to require judicial intervention to protect students' constitutional rights," any restrictions "over the style and content of student speech in school-sponsored expressive activities," must be "reasonably related to legitimate pedagogical concerns." Id. at 273. According to the Third Circuit, "[a] wide variety of policy justifications may pass muster under this test." Brody Through Sugzdinis v. Spang, 957 F.2d 1108, 1122 (3d Cir. 1992). Specifically, "'reasonable' grounds for content based restrictions include the desire to avoid controversy . . . and an interest in maintaining the appearance of neutrality . . . provided that these are

not simply pretexts for viewpoint discrimination." Id. (internal citations omitted).

As discussed under the "purpose" prong of the Lemon test, Defendants have provided sufficient evidence to convince the Court that the interpretation of Policy 2270 was intended to prevent an overt endorsement of religion or an improper focus on religious holidays. Just as that purpose was not a sham, it was also not a pretext for viewpoint discrimination. The Court finds that the interpretation of Policy 2270 is reasonably related to legitimate pedagogical concerns.

* * *

Applying the standards articulated in Kuhlmeier to this case, the Court concludes that the December concerts are not public fora and that the interpretation of Policy 2270 is reasonably related to legitimate pedagogical concerns. The Court grants Defendants' motion for summary judgment with respect to the First Amendment claim.

CONCLUSION

For the stated reasons, Plaintiff Michael Stratechuk's motion for summary judgment is denied; Defendants Board of Education, South Orange Maplewood School District, Brian F. O'Leary, and Peter P. Horoschak's motion for summary judgment is granted.

August 28, 2008

s/William H. Walls
United States Senior District Judge

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APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civ. No. 04-6189 (WHW)

[Filed August 28, 2008]

MICHAEL STRATECHUK, individually and on behalf of his minor children,	)
Plaintiff,	)
v.	)
BOARD OF EDUCATION, SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT; BRIAN F. O'LEARY, in his official capacity as Board President, Board of Education, South Orange-Maplewood School District; PETER P. HOROSHAK, in his official capacity as Superintendent, South Orange-Maplewood School District,	)
Defendants.	)

ORDER

Walls, Senior District Judge

This matter having been opened to the Court by Plaintiff Michael Stratechuk, seeking summary judgment on the first claim of the Amended Complaint, and Defendants Board of Education, South Orange Maplewood School District, Brian F. O'Leary, and Peter P. Horoschak, seeking summary judgment on all claims of the Complaint; and the Court having considered the moving, opposition, and reply briefs and having heard oral argument; and for good cause shown:

It is on this 28th day of August, 2008,

ORDERED that Defendants' motion for summary judgment is **GRANTED**; and it is further **ORDERED** that Plaintiff's motion for summary judgment is **DENIED**.

s/William H. Walls
United States Senior District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 08-3826

[Filed December 30, 2009]

MICHAEL STRATECHUK, Individually and on behalf of his minor children, Appellant	)
v.	)
BOARD OF EDUCATION, SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT; BRIAN F. O'LEARY, In his official capacity as board president, Board of Education, South Orange-Maplewood School District; PETER P. HOROSHAK, In his official capacity as superintendent, South Orange-Maplewood School District	)

SUR PETITION FOR REHEARING

Present: SCIRICA, Chief Judge, SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, and HARDIMAN, Circuit Judges

The petition for rehearing filed by Appellant Michael Stratechuk in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

/s/ Dolores K. Sloviter
Circuit Judge

Dated: December 30, 2009

MLR/cc:
Christopher A. Ferrara, Esq.
Robert J. Muise, Esq.
Michael F. O'Neill, Esq.
Robert B. Hoffman, Esq.